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In the Supreme Court of the United States

OCTOBER TERM, 1979

PEOPLE OF THE STATE OF ILLINOIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals in the *Prairie Trunk* case (Pet. App. 1a-18a) is reported at 604 F. 2d 519. The opinion of the court of appeals in the *Crab Orchard and Egyptian* case (Pet. App. 21a-30a) is not yet reported. The decisions of the Interstate Commerce Commission (Pet. App. 32a-74a, 75a-88a) are reported at 348 I.C.C. 832 and 360 I.C.C. 45.

JURISDICTION

The judgment of the court of appeals in the *Prairie Trunk* case was entered on August 16, 1979 (Pet. App. 19a), and a petition for rehearing was denied on September 21, 1979 (Pet. App. 20a). On December 7, 1979, Mr. Justice Stevens extended the time for filing a

petition for a writ of certiorari in *Prairie Trunk* to and including January 19, 1980. The judgment of the court of appeals in the *Crab Orchard and Egyptian* case was entered on November 29, 1979 (Pet. App. 31a). The petition for a writ of certiorari in both cases was filed on January 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the circumstances of these cases, the Interstate Commerce Commission properly authorized a railroad carrier to acquire the line of another carrier pursuant to former Section 1(18) of the Interstate Commerce Act, instead of former Section 5(2) of the Act.

STATUTES INVOLVED

Former Sections 1(18) and 5(2) of the Interstate Commerce Act, 49 U.S.C. (1970 ed.) 1(18) and 5(2), are set forth in pertinent part at Pet. 3-5.

STATEMENT

This litigation arises from two separate proceedings before the Interstate Commerce Commission involving applications to abandon and acquire certain segments of railroad lines. Those applications were filed under former Section 1(18) of the Interstate Commerce Act, 49 U.S.C. (1970 ed.) 1(18).[1] Petitioners challenge the Commission's

[1]Former Section 1(18) was amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. No. 94-210, 90 Stat. 31) (the 4-R Act). That Act restructured Section 1(18) and deleted certain provisions relating to railroad discontinuances and abandonments. Congress later reenacted the Interstate Commerce Act as Subtitle IV of Title 49, United States Code (Pub. L. No. 95-473, 92 Stat. 1337). That recodification did not make any substantive change. See 92 Stat. 1466. Former Section 1(18), as recodified, will appear at 49 U.S.C. 10901.

holding that the abandonment and acquisition applications were properly processed under former Section 1(18).

1. *The Prairie Trunk Case*

In December 1971 the Baltimore & Ohio Railroad Company (B&O) filed an application for a certificate of public convenience and necessity under former Section 1(18) of the Act to abandon operations over a 73.27 mile line of track between Flora and Shawneetown, Illinois. A 5.36 mile portion of the track was owned and operated by B&O jointly with Louisville & Nashville Railroad Company. In February 1973 a Commission administrative law judge issued an initial decision recommending denial of the abandonment application (Pet. App. 2a-3a; 34a).

In October 1973 Prairie Trunk Railroad, a company organized for the purpose of purchasing and operating the 73.27 mile line of track, filed an application for a certificate of public convenience and necessity under former Section 1(18) that would permit it to purchase the line. B&O supported Prairie Trunk's acquisition application (Pet. App. 3a).

In September 1974 Trans-Action Associates, a non-operating holding company controlling a railroad, filed an application under former Section 5(2) to acquire corporate control of Prairie Trunk (Pet. App. 3a, 5a). Former Section 5(2) (recodified as 49 U.S.C. 11343) requires Commission approval for a holding company to acquire control of more than one carrier subject to the Commission's jurisdiction.

In June 1975 the administrative law judge approved Prairie Trunk's acquisition application subject to certain conditions, including the approval of Trans-Action's

application for authority to control Prairie Trunk and the imposition of the so-called *Burlington* employee protection requirements (see *Chicago, B. & Q. R.R. Co. Abandonment*, 257 I.C.C. 700 (1944)) (Pet. App. 4a-5a, 36a-37a).

The Commission adopted the administrative law judge's recommended decision (Pet. App. 32a-74a). It found that public convenience and necessity justified Prairie Trunk's acquisition of the 73 mile section of B&O track and approved Trans-Action's application for permission to assume control of Prairie Trunk. It also imposed the *Burlington* employee protection requirements as recommended by the administrative law judge.

In its decision, the Commission concluded that Prairie Trunk's application was properly considered under former Section 1(18) of the Act instead of former Section 5(2). The Commission explained (Pet. App. 60a-61a) (footnote omitted):

> On the basis of congressional intent we have found section 5(2) to be the appropriate provision for dealing with the unification of existing railroad enterprises, as in the case of consolidation or merger. *Okmulgee Northern Ry. Co. Abandonment, supra*, 639-640; see also *Tennessee Central Ry. C. Abandonment*, 334 I.C.C. 235, 245; and *Southern Ry. Co.-Control-Central of Georgia Ry. Co.*, 331 I.C.C. 151, 156-157. Section 1(18), on the other hand, is intended to deal with the abandonment, acquisition, and extension of an individual line of railroad and is essentially directed at the transportation-oriented activities of a single rail carrier or applicant; cf. *Okmulgee Northern Ry. Co. Abandonment, supra*, 639-640; and *Iowa Term. R. Co. Acquisition and Operation, supra*, 548-549. In its present

> condition Prairie Trunk stands as a noncarrier seeking to acquire a line of railroad. As a noncarrier it is not subject to section 5(2) and is only subject to 1(18) inasmuch as, upon approval of the acquisition, it proposes to conduct operations over the Flora-Shawneetown line. *Iowa Term R. Co. Acquisition and Operation, supra*, 548-549. The proposed acquisition does not contemplate merger or unification of existing rail enterprises, but rather is concerned with the simple acquisition of a line by a prospective new rail carrier. We are satisfied that section 1(18) rather than section 5(2) is the most appropriate provision to deal with the type of transaction herein pending.

The only application for permission to acquire control of a railroad company was Trans-Action's application to acquire Prairie Trunk as a wholly owned subsidiary. The Commission concluded that this application was properly filed and processed under former Section 5(2) of the Act (Pet. App. 66a-67a).

2. *The Crab Orchard and Egyptian Case*

In October 1976 the Illinois Central Gulf Railroad Company filed an application under former Section 1(18) to abandon a 14.5 mile railroad line between Seely and Mande, Illinois. In April 1977 American Rail Heritage, Ltd., doing business as the Crab Orchard and Egyptian Railroad, filed an application under former Section 1(18) to acquire 8.53 miles of the line to be abandoned by Illinois Central (Pet. App. 22a-23a).

Following a hearing and initial decision by the administrative law judge, the Commission granted COE's application to acquire the 8.53 mile segment of track, dismissed the duplicative portion of Illinois Central's

abandonment application, and approved the abandonment by Illinois Central of the remaining 5.97 mile portion of the line. The Commission also imposed on Illinois Central the employee protection requirements recently prescribed in *Oregon Short Line R.R. Co.-Abandonment-Goshen*, 354 I.C.C. 584 (1978) (Pet. App. 75a-88a).[2] As in the *Prairie Trunk* case, the Commission concluded that the Crab Orchard and Egyptian application was properly filed under former Section 1(18) rather than former Section 5(2) (Pet. App. 78-80a).

The court of appeals affirmed the decisions of the Commission in both cases (Pet. App. 1a-18a, 21a-30a).

ARGUMENT

The decisions of the court of appeals, on which we generally rely, correctly reject petitioners' contention (Pet. 10-17) that the Commission was required to consider the applications of the Prairie Trunk and Crab Orchard and Egyptian railroads under former Section 5(2) of the Act rather than former Section 1(18). Those decisions do not conflict with the decisions of this Court or any court of appeals. Further review by this Court is not warranted.

1. The Commission's decisions rest on the premise that former Section 1(18) was designed "to deal with the abandonment, acquisition, and extension of an individual line of railroad and [was] essentially directed at the transportation-oriented activities of a single rail carrier or applicant," while former Section 5(2) was "the appropriate provision for dealing with the unification of

[2]The 4-R Act requires the Commission to adopt in all cases protective conditions for the benefit of employees that are at least as beneficial as those previously required under former Section 5(2). See 49 U.S.C. 10903(b)(2). The *Oregon Short Line* conditions were developed by the Commission to satisfy that requirement. Those conditions were recently upheld by the Second Circuit. See *New York Dock Ry.* v. *United States*, 609 F. 2d 83 (1979). See also page 8, *infra*.

existing railroad enterprises, as in the case of consolidation or merger" (Pet. App. 60a). The court of appeals correctly concluded that this was a reasonable interpretation of the statute and consistent with prior Commission decisions (Pet. App. 8a-12a). The Commission's interpretation is also consistent with this Court's construction of Section 5(2). See, *e.g.*, *County of Marin* v. *United States*, 356 U.S. 412, 416-418 (1958); *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 315-321 (1954). Petitioners have cited no authority supporting their contrary contention.[3]

2. In any event, the question raised by petitioners is of no continuing importance in view of Congress' amendments to Section 1(18) under the Railroad Revitalization and Regulatory Reform Act.

[3]In the *Prairie Trunk* proceeding, the Commission noted an alternative and independent basis for relying on Section 1(18). Prairie Trunk was not a common carrier by railroad at the time of its application (Pet. App. 60a). As the court of appeals explained (*ibid.*), it has long been settled that Section 1(18) applies to proceedings in which non-carriers seek to obtain initial interstate operating authority. Petitioners do not dispute this principle or the fact that Prairie Trunk was not a carrier. Rather, they contend that the application must fall under Section 5(2) because it relates in part to certain joint trackage with another carrier over a 5.36 mile segment (Pet. 12, 17). As the court of appeals correctly held, however, this element of Prairie Trunk's intended new operation was *de minimis* and could "not compel proceeding under Section 5(2) in what was otherwise a Section 1(18) case" (Pet. App. 11a).

The court of appeals also noted that this alternative ground for utilizing Section 1(18) could apply to the Crab Orchard and Egyptian application as well. The only interstate operations of that company had been pursuant to an emergency order of the Commission permitting it to conduct operations for three months pending action on its application for permanent authority (Pet. App. 24a-25a).

As the court of appeals explained (Pet. App. 17a), the question whether the Commission should proceed under Section 1(18) or 5(2) is significant only with respect to the degree of employee protection that is required in connection with abandonment proceedings. The *Burlington* conditions, which the Commission generally imposed under Section 1(18) and which were imposed in *Prairie Trunk*,[4] often provided less protection to employees than the conditions imposed under Section 5(2). In the present circumstances, however, the difference between the conditions has no practical importance. As the court below noted (Pet. App. 17a), "[p]etitioners have made no argument that the *Burlington* conditions are inadequate to protect the interests of the affected employees."

In future cases, the 4-R Act will eliminate any difference between the protection afforded to workers under the two sections. That Act revises the employee protection standards applicable under Section 1(18) to require protection "at least as beneficial to [the] interests [of employees] as * * * [that] established under section 11347 [former Section 5(2)] of this title." 49 U.S.C. 10903(b)(2). The *Oregon Short Line* conditions were prescribed by the Commission after the enactment of the 4-R Act to govern both Section 1(18) and Section 5(2) proceedings (see note 2, *supra*). Thus, the employee protection issue in this case presents no question of continuing importance.

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[4]The *Burlington* conditions were imposed in *Prairie Trunk* because that case was finally decided prior to the time when the new *Oregon Short Line* conditions became applicable (Pet. App. 17a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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